

THE BOTTOM LINE

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FACING SUBSTANCE ABUSE HEAD-ON RESOURCES FOR ATTORNEYS WHO “WAKE-UP” TO A SUBSTANCE ABUSE PROBLEM

By Ernest Schaal



Ernest Schaal

Since “denial” is such a major factor in substance abuse, this article won’t waste your time explaining how that abuse can ruin your career. Instead, this article summarizes some of the resources available to help California attorneys having substance abuse problems keep their bar cards.

This article is written based on two assumptions. The first is that most of the readers of this article are reading it for one reason only: to satisfy their one-hour MCLE requirement for substance abuse. According to a November 2000

article in the *California Bar Journal* (www.calbar.org/2cbj/00nov/), it is estimated that 15 to 17 percent of California attorneys are alcoholics. That means that at least four out of five attorneys are not alcoholics and won’t need these resources. Those with a



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drinking problem are probably in denial and think that they don’t need them either.

The second assumption is that Newton’s first law of motion applies to people in denial. That law states that “An object at rest tends to stay at rest and an object in motion tends to stay in motion with the same speed and in the same direction unless acted upon by an unbalanced force.” In other words, people in denial will probably stay in denial until some type of unbalanced force causes them to snap out of that denial. If there is no unbalancing force, inertia will keep them in denial. One way of looking at that unbalancing force is as a “wake up call.” Examples of such unbalancing forces include malpractice suits, disciplinary complaints, accidents, arrests, or abandonment by a significant other.

The type of unbalanced force one encounters will have a major impact on the options available for that individual. For instance, if a lawyer with a drinking problem “wakes up” because a loved one moves out, that lawyer would have more resources available than if the “wake up call” is a disciplinary action

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involving injury to a client or an arrest for vehicular manslaughter.

I. Ethics Research Online

The California State Bar has an "Ethics Research Online" page on their website at www.calbar.org/ethics.html. Of particular interest to someone facing a disciplinary action are the sections relating to the disciplinary process. These include:

The California Rules of Professional Conduct

www.calbar.org/pub250/crpc.htm

The State Bar Act

www.calbar.org/pub250/sbact.htm

The Rules of Procedure for the State Bar

www.calbar.org/2bar/3sbct/rules/3r-proc.htm

The Rules of Practice for the State Bar

www.calbar.org/2bar/3sbct/rules/3r-prac.htm

Rule 3-110 (Failing to Act Competently) of the Rules of Professional Conduct (www.calbar.org/pub250/9/s0016.htm) sets for the requirement that a member of the bar shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence. Since substance abuse can affect competence, this rule often comes into issue.

Substance abuse can not only affect competence of an attorney, but also the judgment of that attorney. Therefore, other rules may become issues, depending upon the nature of the lapse of judgment. Examples of such lapses include improper sexual relations with a client (See Rule 3-120 at www.calbar.org/pub250/9/s0017.htm) and misuse of a trust account (See Rule 4-100 at www.calbar.org/pub250/9/s0028.htm).

If the substance abuse causes reduced competence in such a way as to threaten the client's interest, it could result in involuntary enrollment of the lawyer as an inactive member. Section 6007 of the State Bar Act (www.calbar.org/pub250/b/s0010-a.htm) outlines the procedures for that involuntary enrollment. As stated in subsection (b)(3), after notice and opportunity to be heard before the board or a committee, a member will be involuntarily enrolled as an inactive member when "the board finds that the member, because of mental infirmity

or illness, or because of the habitual use of intoxicants or drugs, is (i) unable or habitually fails to perform his or her duties or undertakings competently, or (ii) unable to practice law without substantial threat of harm to the interests of his or her clients or the public."

That paragraph states that no such proceeding shall be instituted unless the board or a committee finds that probable cause exists therefore, but the determination of probable cause is administrative in character and no notice or hearing is required. The involuntary enrollment will be terminated upon proof that the facts found as to the member's disability no longer exist and on payment of all required fees.

As discussed in a September 1996 article of the *California Bar Journal* (See www.calbar.org/2cbj/96sep/art8.htm), the courts have the authority to take over an attorney's practice, Article 12 (Sections 6190-6190.6) of the State Bar Act (See www.calbar.org/pub250/sbact12.htm) outlines that authority when, because of excessive use of alcohol or drugs or for other reasons, the attorney become incapable of providing the quality of service needed to protect the client's interest.

The particular rules or statutes that apply to an attorney having a substance abuse problem will, of course, depend upon the particular facts relating to the nature of that problem. As a general rule, the State Bar is more lenient if no laws are violated, no clients are hurt, and the attorney displays spontaneous candor and cooperation to the State Bar during the disciplinary investigation and proceedings.

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II. The Attorney Diversion and Assistance Program

A very new resource was created by the Attorney Diversion and Assistance Act signed by Governor Davis in the summer of 2001. That act became sections 6230 to 6238 of the Business and Professions Code. This new program is discussed in an article in the January 2002 issue of the *California Lawyer* (See "Help for Addicted Attorneys" at www.dailyjournal.com/calawyer/index.cfm?sid=&tkn=&eid=418883&evd=1). The text of this act can be found at the Legislative Counsel of California website at www.leginfo.ca.gov/cgi-bin/displaycode?section=bpc&group=06001-07000&file=6230-6238.

The purpose of the program (found in Section 6230) is to identify and rehabilitate attorneys with impairment due to abuse of drugs or alcohol, or due to mental illness, affecting competency so that attorneys so afflicted may be treated and returned to the practice of law in a manner that will not endanger the public health and safety.

An attorney currently under investigation by the State Bar may enter the program by referral of the Office of the Chief Trial Counsel, by referral by the State Bar Court following the initiation of a disciplinary proceeding, or voluntarily, as long as the investigation is based primarily on the self-administration of drugs or alcohol or the illegal possession, prescription, or nonviolent procurement of drugs for self-administration, or on mental illness, and does not involve actual harm to the public or his or her clients. (See Bus. & P.C. 6232 (b)).

An attorney currently under investigation by the State

Bar who enters the program may be enrolled as an inactive member of the State Bar and may not be entitled to practice law, or may be required to agree to various practice restrictions, including restrictions on scope of practice and monetary accounting procedures.

The advantage of entering that program is that, upon the successful completion of the program, those attorney participants on inactive status who

complied with any and all conditions of probation shall be eligible for reinstatement to active status and a dismissal of the underlying allegations or a reduction in the recommended discipline. Those attorneys who participated in the program with practice restrictions shall be eligible to have those restrictions removed and to a dismissal of the underlying allegations or a reduction in the recommended discipline. (See Bus. & P.C. 6233).

An attorney who is not the subject of a current investigation may voluntarily enter the diversion and assistance program on a confidential basis. That confidentiality is absolute unless waived by the attorney. (See Bus. & P.C. 6232 (d)).

As stated before, this is a relatively new program, only enacted in the summer of 2001, and it might not be implemented yet

by the time you read this article. To check availability of this program, check the State Bar web site.

THE ADVANTAGE OF ENTERING THE ATTORNEY DIVERSION AND ASSISTANCE PROGRAM IS THAT, UPON THE SUCCESSFUL COMPLETION OF THE PROGRAM, THOSE ATTORNEY PARTICIPANTS ON INACTIVE STATUS WHO COMPLIED WITH ANY AND ALL CONDITIONS OF PROBATION SHALL BE ELIGIBLE FOR REINSTATEMENT TO ACTIVE STATUS AND A DISMISSAL OF THE UNDERLYING ALLEGATIONS OR A REDUCTION IN THE RECOMMENDED DISCIPLINE.

III. The Other Bar

Not all resources are offered by the State Bar. For instance, The Other Bar is a network of volunteer lawyers and judges who deal with alcoholism and chemical dependency on a personal and absolutely confidential

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CERTIFICATION: The State Bar of California certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education. This activity has been approved for the minimum continuing education credit by the State Bar of California in the amount of 1.00 hours which will apply to Law Practice Management.

QUESTIONS: FACING SUBSTANCE ABUSE HEAD-ON

1. According to the cited estimate in the California Bar Journal, 35% to 37% of California attorneys are alcoholics.

True False

2. The California State Bar web site has resources online, including at the California Rules of Professional Conduct, the State Bar Act, the Rules of Procedure for the State Bar, and the Rules of Practice for the State Bar.

True False

3. Since substance abuse can affect competence, a substance abuser might be in violation of the Rules of Professional Conduct relating to competence.

True False

4. The Rules of Professional Conduct do not apply to mistakes in judgment that may be caused by substance abuse.

True False

5. The State Bar can involuntarily enroll as an inactive member a lawyer who, because of habitual use of intoxicants or drugs, habitually fails to perform his or her duties or undertakings competently.

True False

6. In order to involuntarily enroll as an inactive member, the board must find that the member, because of mental infirmity or illness, or because of the habitual use of intoxicants or drugs, is both (i) unable or habitually fails to perform his or her duties or undertakings competently, and (ii) unable to practice law without substantial threat of harm to the interests of his or her clients or the public."

True False

7. The involuntary enrollment will be terminated upon proof that the facts found as to the member's disability no longer exist and on payment of all required fees.

True False

8. Before the State Bar can institute a proceeding to involuntarily enroll a lawyer as an inactive member, there must be probable cause and there must be a hearing as to that probable cause.

True False

9. The courts can assume jurisdiction over an attorney's practice when, because of excessive use of alcohol or drugs, the attorney becomes incapable of providing the quality of service needed to protect the client's interest.

True False

10. The purpose of the Attorney Diversion and Assistance Program is to identify and rehabilitate attorneys with impairment due to abuse of drugs or alcohol, or due to mental illness, affecting competency so that attorneys so afflicted may be treated and returned to the practice of law in a manner that will not endanger the public health and safety.

True False

11. The Attorney Diversion and Assistance Program has a long tradition of helping rehabilitate attorneys.

True False

12. Attorneys entering the Attorney Diversion and Assistance Program while under investigation by the State Bar could be enrolled as an inactive member of the State Bar, which means they are not entitled to practice law, or they may be required to agree to various practice restrictions, including, restrictions on scope of practice and monetary accounting procedures.

True False

13. The Attorney Diversion and Assistance Program is designed for all types of investigations involving substance abuse by lawyers.

True False

14. Any attorney may voluntarily enter the diversion and assistance program on a confidential basis.

True False

15. Upon the successful completion of the program, those attorney participants on inactive status who complied with any and all conditions of probation shall be eligible for reinstatement to active status and a dismissal of the underlying allegations or a reduction in the recommended discipline.

True False

16. The Other Bar deals solely with alcoholism among lawyers and judges.

True False

17. The Other Bar operates a 24-hour toll-free telephone hotline.

True False

18. The Other Bar is part of the State Bar.

True False

19. The Other Bar has its own web site.

True False

20. The Other Bar has a legal duty to report to the State Bar the names of any attorneys contacting them.

True False

